No. 74-68

SEP 30

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

CLARION CORPORATION,

Petitioner,

vs.

AMERICAN HOME PRODUCTS CORPORATION, LEHMAN BROTHERS, and RICHARD F. WATT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY MEMORANDUM OF PETITIONER CLARION CORPORATION IN REBUTTAL TO RESPONDENTS' ANSWERS

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After filing its petition for certiorari, petitioner learned of the textbook, THE PROFESSION OF LAW, by L. Ray Patterson and Elliott E. Cheatham with a foreword by Chief Justice Warren E. Burger, published 1971 by The Foundation Press. A perusal of this authoritative book has given insights on respondents' handling of the questions in the case so that, in retrospect, it is now realized that the Court of Appeals misapprehended key aspects of the case as a

result of questionable tactics by respondents. The book states on page two three standards which are given expression in many detailed rules on the conduct of lawyers: (1) loyalty to his client, (2) candor to the court, and (3) fairness to his opponent. The increasing importance being given to the latter two standards is changing the nature of adversary proceedings. Examples of breaches of these standards are reflected in respondents' answers now before the Court.

Essentially, respondents' tactics are to present a misleading picture of the case by repeatedly making unqualified assertions as if the assertions were undisputed facts and omitting any mention they have never denied or challenged petitioner's allegations rooted in substantial documentary proof refuting respondents' unqualified assertions. After making unqualified assertions the respondents then use the assertions as a foundation to allege petitioner is engaging in obstructive and scandalous conduct.

Because of its importance to the basic requirement that a plaintiff must show he has been harmed by defendants' actions, petitioner first would like to touch on the key pivotable importance to respondents not denying or refuting in any way whatsoever petitioner's allegations regarding the analysis given to it on June 3, 1974 by Mr. Watt's attorneys, Altheimer & Gray, to the effect that on the narrow grounds the evidence was not in the District Court record, the Court of Appeals' decision of April 2, 1974 excluded clear documentary proof which refutes its conclusions. The conclusions drawn by the decision that there were no cover-up improprieties are based on the court treating petitioner's letter of August 5, 1962 purporting to agree to a $100,000 finder's fee to be of such controlling importance as to conclude petitioner was not prejudiced or harmed by the conduct of the trial

judge and petitioner's former attorneys because by comparison to the $100,000 the discounted present worth of the still unconsummated settlement is $200,000. However, respondents do not deny or refute petitioner's allegations that the cover-up plan deliberately kept out of the District Court record conclusive documentary evidence proving that the August 1962 letter on its face was limited to the aborted 1962 merger proceedings and when the proceedings were terminated in the latter part of 1962, the August 1962 letter on which the Court of Appeals relied upon so heavily was unequivocably cancelled. Respondents, therefore, are tacitly agreeing that the Court of Appeals erred in its treatment of the August 1962 letter and instead should have used as a basis for comparison the $916,000 that Lehman wrongfully appropriated in 1965 by acts constituting interference with a competitor's business. The $916,000 amounts to the ½ of 1% finder's fee agreement agreed upon by Ekco when the parties were brought together again in 1965 in an entirely new and different merger transaction consummated in 1965. In short, the respondents tacitly concur that the Court of Appeals erred in concluding petitioner was not harmed or prejudiced by the conduct of the trial judge and petitioner's former attorneys. There is further tacit concurrence by respondents that the Court of Appeals also erred in not addressing the question that the trial judge was not qualified by virtue of his undisputed conflict of interest and personal involvement in the case to have denied the reasonable timely raised request by petitioner for an evidentiary hearing which would have brought the excluded evidence into the record.

The cover-up of the documentary evidence on Lehman wrongfully appropriating the $916,000 is the crux of the case particularly because it is conceded that proof of

damages is the sole issue and that there is a judicial admission to the effect that petitioner is the only party entitled to receive whatever finder's fee is to be paid in the 1965 merger transaction. The flagrant manner in which the cover-up was carried out is demonstrated by Mr. Watt's I-told-you-so letter of April 2, 1970 revealing the wanton mechanics of the plan in suppressing American Home's books of original entry showing the entire $916,000 payment to Lehman as a "finder's fee".

Coming back to the misleading tactics used by respondents to misdirect the Court, both Mr. Watt in his response and American Home and Lehman in their joint response, are acting in concert in the stratagem of basing unfounded charges of obstructionism and scandalous conduct by petitioner on first making unqualified assertions on turnkey aspects of the case without mentioning they do not deny or challenge the conclusive evidence presented by petitioner which refute their assertions. For example, their answers repeat unqualified assertions that petitioner "voluntarily" accepted a settlement and at the same time they omit the undisputed facts as described on pages 21-23 of the petition proving the acceptance was coerced by disgraceful whipsawing tactics on the eve of the April 8, 1970 trial date and repeated again later to coerce a second acceptance at the February 8, 1971 dismissal hearing. In addition to the acceptance being involuntary respondents do not deny that it was not until after that acceptance that petitioner discovered the disqualifying conflict of interest and the personal involvements in the cover-up plan of the trial judge as well as the undisputed documentary evidence that Lehman's attorneys, Kirkland & Ellis, in express violation of Canon 5 of the Code of Professional Responsibility condoned and furthered Lehman's fraudulent cover-up actions in these judicial proceedings.

A second example of making misleading unqualified assertions is Mr. Watt's assertion on page 4 of his response "that settlement proceeds were within the district in possession of American Home or its attorneys". He makes no mention that American Home expressly notified petitioner in writing it was prepared to tender settlement proceeds only on the prior condition that petitioner first consummate the settlement and waive any claims against Lehman and its attorneys on acts the cover-up significance of which petitioner did not discover until after its involuntary acceptance.

Mr. Watt never disputed the accuracy of petitioner's statement on long standing law holding (1) under constitutional doctrines and law the Illinois Attorney's Lien Statute must be strictly construed because it is not derived from common law, (2) under the required strict construction of the statute there can not be any attachable proceeds until proceeds are actually forthcoming from a settlement actually being consummated, and (3) that litigants such as petitioner have full control over their actions in consummating a settlement. Mr. Watt does not dispute this statement on the law which bars his action to seize unrealized proceeds of an unconsummated settlement.

Additionally, if the law was not so obvious in clearly barring his action, Mr. Watt proceeding under Rule 70 would nonetheless violate the due process doctrine because the adjudicatory procedure of Rule 70 precludes traditional procedures of a jury deciding an issue of fact such as whether the conditional tender by American Home constitutes attachable settlement proceeds. The broader constitutional question is that Mr. Watt's lien itself is unconstitutional because it exists only by virtue of the Illinois Attorney's Lien Statute itself violating due process re-

quirements of the 14th amendment. Not only does the statute provide for a grossly inadequate notice period of only five days to secure counsel and prepare a response, but it also precludes traditional procedures of a trial by jury and the right to assert cross and counter claims.

Mr. Watt's assertion that petitioner did not seek review of the Court of Appeals' decision in his first lien action begs the question that even if he did have a constitutionally valid lien, the decision merely affirmed the lower court's award of the right to enforce the lien in accordance with the constitution and statutory laws. In the absence of a consummated settlement Mr. Watt's only recourse is to file an independent suit as any other creditor would have to do. His Rule 70 action is a blatant attempt to manipulate rules of procedure for an unfair advantage to evade a trial by jury and petitioner's right to assert cross and counter claims. See PROFESSION OF LAW, page 86.

On the point of petitioner not seeking review of the Court of Appeals' first decision, petitioner did not know the procedures for doing this and was discouraged in not being able to persuade the Court of Appeals to rule on undisputed evidence which ~~were~~ is of obvious importance. It therefore felt any steps taken to seek a review would be a hopeless effort without a skilled attorney to articulate a more persuasive case. Later as petitioner acquired some legal understanding of what occurred it was able to elicit data from lawyers which pierced the wall of secrecy surrounding the code of silence and more recently Altheimer & Gray unwittingly revealed the technicality on which the cover-up evidence was excluded by the two Court of Appeals' decisions. Bender's Federal Practice Manual which petitioner also recently came across is providing the reference guides for pursuing this petition at this time.

On page 6 of his response, Mr. Watt makes the unfounded claim that the petition violates Rule 23 and Rule 40; that it is confused and confusing mixture of fact, opinion and fancy; and that it does not state with clarity a single reason why this Court should grant review. Chief Justice Warren E. Burger's foreword in THE PROFESSION OF LAW highlights the basic issue in the case as being a failure of the legal process. The Chief Justice states "The American system for the administration of law is structured like a tripod: the process requires three participants, the contending lawyers and the neutral judge or triers. If any of these three supports of the adversary tripod is missing, the process fails. If any 'leg' of this tripod is disproportionately weak, the structure as a whole is weakened." * * * "Lawyers' standards of conduct and performance are, indeed, an integral part of the law itself". The evidence which Mr. Watt does not dispute demonstrates that there are two supports of the adversary tripod missing. One is that Mr. Watt's conduct and performance violates all standards of acceptable conduct. The second support missing is that of the neutral judge. The trial judge, Judge Lynch, cannot be said to be neutral in light of his complicity in tampering with crucial evidence and falsifying his continuing business relationship with a key party defendant in a corrupt race track operation engaged in subornation and threats of reprisals—see pages 11-13 and 24 of the petition. Mr. Watt does not deny he expressed he has a real fear of reprisals by Judge Lynch (page 13 of the petition) and the inferences are abundantly clear it is this real fear in the context of Judge Lynch's documented background (such as brought out as a result of the Judge Kerner's trial) combined with his conduct during the proceedings in this case that influenced Mr. Watt to betray his loyalty to his client by joining the cover-up conspiracy.

In short, under the Chief Justice's statement on how the legal process functions there has been a failure of the process in this case to the harm and detriment of petitioner.

To anyone familiar with the authoritative Justice Clark task group report issued by the American Bar Association, it is readily apparent, despite severe provocative circumstances, that petitioner exercised considerable restraint in drawing only limited portions of the report to corroborate the harsh truths of its own empirical experiences concerning the code of silence in the legal profession. Without disputing petitioner's findings and similar findings adopted by the Justice Clark report, Mr. Watt charges this is scandalous to the Chicago Bar. The absurdity of Mr. Watt's charge is demonstrated by the fact it imputes the same absurd charges against Justice Clark and his group for uttering the harsh truth about the widespread existence of the insidious code of silence. Petitioner was careful to identify in its presentation to the Court of Appeals the identities of many of the Chicago attorneys and the distinguished University of Chicago law professor who made revealing comments such as reported on page 25 of the petition. It was, therefore, quite easy for respondents to verify the accuracy of these comments by simply picking up the telephone and calling these individuals. The fact that none of these comments have ever been challenged by opposing attorneys who have a composite of wide experience on how the system works is another corroboration of petitioner's findings on the code of silence.

Respondents are trying to create the false impression that petitioner's position is based on mere assertions unsupported by any tangible evidence. The chain of evidence, however, is rooted in hard tangible evidence which has never been challenged. Respondents' dissembling tactics

are stratagems of distortions and implausible counter-charges to misdirect the Court from the realities of the case. Mr. Watt's only defense to the overwhelming documentary evidence is the vague claim he exercised professional judgment. He completely evades the undisputed documented circumstances as detailed on pages 19-22 of the petition that his I-told-you-so letter of April 2, 1970 stands as an inviolate and irrefutable statement of guilt revealing not only that he wantonly planned a trap to suppress crucial American Home books showing the $916,000 payment to Lehman as a "finder's fee", but also that he made the bald attack on the integrity and fairness of federal judicial processes as an integral part of manipulations to coerce petitioner into accepting the still unconsummated settlement.

Respectfully submitted,

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